

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

SPONSOR Taylor DATE TYPED 02/28/05 HB _____

SHORT TITLE Mortgage Lenders and Brokers Licensure Act SB 675

ANALYST McSherry

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
NFI	NFI		\$160.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts
 Regulations and Licensing Department
 Attorney General's Office

SUMMARY

Synopsis of Bill

Senate Bill 675 proposes to create the "Mortgage Lenders and Brokers Licensure Act" and repeal the "Mortgage Loan Company and Loan Broker Act."

The Mortgage Lenders and Brokers Licensure Act would establish standards governing the business practices of mortgage lenders and mortgage brokers and would provide for regulation of mortgage lenders and mortgage brokers.

The bill proposes to:

Define terms: "managing broker," "managing loan officer," "mortgage broker," "mortgage brokering," "mortgage lender," "mortgage loan," "principal," "principal broker," "principal loan officer," "principal place of business," and "table funded mortgage loan transaction."

Exempt certain persons and institutions from either the entire Act or from specific portions of the Act

Provide that the burden of establishing the right to an exemption would rest upon the party claiming the benefit of the exemption.

Subject a mortgage loan to the provisions of the Act, notwithstanding the method or location in which the mortgage loan is provided.

Require that anyone establishing oneself to a borrower or the general public as either a mortgage lender or broker would have to obtain a license.

Establish conditions under which a license may be granted and renewed

Govern education providers.

Require the director of the Financial Institutions Division (FID) of the Regulation and Licensing Department (RLD) to conduct an investigation upon receipt of an application for a license or for the renewal of a license, and

Require the FID director to notify an applicant of a denial of a license or a renewal, and to state the reasons for the denial.

Establish requirements regarding change of control of a licensee, and licensees' financial responsibility,

Establish principal loan officers and managing loan officers, principal brokers and managing brokers.

Establish record-keeping requirements, and reporting requirements for licensees and mortgage lenders and mortgage brokers, provisions governing branch offices.

Establish responsibilities of licensees and duties of mortgage brokers.

Outline prohibited activities for mortgage lenders and mortgage brokers.

Establish procedures for making complaints, and conducting investigations and examinations when a person has reason to believe that the Act has been violated by a person required to be licensed pursuant to the Act.

Describe powers and disciplinary actions of the Director of the Financial Institutions Division of the Regulation and Licensing Dept. with regard to the Act.

Provide for notice and a hearing or opportunity for a hearing before any of the enforcement of disciplinary actions pursuant to the Act would be concluded by the director, and exceptions to this requirement.

Provide that a remedy available to a borrower pursuant to the Act would be supplemental to the power of the division to impose disciplinary action or otherwise enforce the provisions of the Act.

Provide that a person making or brokering a loan without the required license would be guilty of a fourth degree felony.

Provide that the director could adopt rules to administer the provisions of the Act.

Describe the fees the director could prescribe under the Act.

Allow the automatic licensure of a mortgage lender or broker who, upon the effective date of the Act, would be registered with the director under the former Mortgage Loan Company and Loan Broker Act.

Provide for liberal interpretation, severability, and emergency enactment.

Significant Issues

The director of the Financial Institutions Division of the Regulation and Licensing Department would be given broad authority to institute proceedings in a court of competent jurisdiction in furtherance of the purposes of the proposed Act. (Section 24.C)

The Act provides that right of a person to an informal hearing pursuant to the Act is in addition to and not in derogation of the person's rights to an administrative hearing and judicial review.

RLD cites that on page 51, lines 4 and 5 state that the act would take effect immediately. Section 31, page 49 lines 11 through 22, state that a mortgage broker licensed pursuant to the Mortgage Lenders and Brokers Licensure Act would have until July 1, 2005 to become licensed pursuant to that act for the period beginning May 1, 2005. A mortgage lender or a mortgage broker who, upon the effective date of the proposed Act, is registered with the director under the former Act would be automatically licensed pursuant to the proposed Act for the period ending July 1, 2005, provided that the mortgage lender or mortgage broker. RLD asserts that the Act does not provide for licensure between the original implementation of the law and the first renewal on March 1, 2006, and suggests that the implementation of the Act should occur on March 1, 2006.

RLD predicts that the bill would cause jurisdiction issues with state chartered banks, savings associations or savings banks and credit unions from other states in the United States. The Department cites that New Mexico and other state chartered banks, savings associations or savings banks and credit unions are not exempt from the Mortgage Lenders and Brokers Licensure Act (definitions page 4, lines 11 through 17).

Certain entities would be provided exemption from some, but not all, of the Mortgage Lenders and Brokers Licensure Act as proposed. RLD suggests that, for some or all of the entities enumerated, the requirement that imposes the forfeiture of the exemption should be reconsidered:

Section 6, page 12, line 25 through page 13, line 9 states that,
If a person solicits or provides a mortgage loan by mail, telephone or electronic means they would be subject to the provisions of the Mortgage Lenders and Brokers Licensure Act: and

Section 4 B, Page 9, line 9 through page 10, line 13 –lists parties exempt from the Act as: (1) an insurance company licensed in New Mexico or an employee of the insurance company; (2) a pension plan that provides mortgage loans exclusively to plan participants or plan assets; (3) a corporation or employee of the corporation that provides mortgage loans to promote home ownership or improvements for the disadvantaged and that has been granted exemption from the federal income tax as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended or renumbered; (4) a person who provides three or fewer mortgage loans in

a calendar year with that person's own funds for the person's own investment and who does not hold himself out to the general public as a mortgage lender or mortgage broker; (5) a person or employee of the person who makes a mortgage loan while acting in a fiduciary capacity conferred by authority of a court; (6) a person or employee of the person who sells purchase money obligations and receives as security for those obligations not more than ten deeds of trust; (7) a person or employee of the person who makes a mortgage loan to that person's employee as a benefit of employment; and (8) a person or employee of the person who makes a mortgage loan to a borrower related to the lender by blood or marriage.

Section 4 C, Page 10, line 14 through page 11, line 7 – lists additional parties exempt from the act: (1) an attorney licensed to practice law in New Mexico, or an employee of the attorney; provided that the attorney does not hold himself out to the general public as a mortgage broker; (2) a licensed real estate salesperson or broker when rendering services as a real estate salesperson or broker subject to regulation and supervision by the New Mexico real estate commission, or an employee of the commission; provided that the real estate salesperson or broker does not receive any fee, commission or other payment for mortgage brokering services or hold himself out to the general public as a mortgage broker; and (3) a person who brokers three or fewer mortgage loans in New Mexico in a calendar year, or an employee thereof, provided that the person is licensed as a mortgage broker under the laws of another state.

The bill defines "misrepresent" by a willful or intentional standard; and, according to the Attorney General's Office, the bill fails to include negligent misrepresentations, which AGO asserts are well-established in New Mexico law, including under the Unfair Practices Act, NMSA 1978.

AGO points out that:

the bill does not directly address the industry norm of unlicensed "independent contractors" engaging in mortgage loan services purportedly under the authority of a licensed broker, a practice which is considered by the Financial Institutions Division to be unlawful, but which it is unable to stop through enforcement actions.

the bill would require surety bonds for licensed persons, but they may not be high enough to protect borrowers, in light of the cost of housing in certain areas of the state.

certain licensees would be permitted to obtain a waiver of the surety bond requirement based on their financial status (net worth of \$1 million or more for three years) and that this waiver would leave borrowers unprotected should any such company file for bankruptcy.

licensees would be designated as fiduciaries of their customers, a status shared by real estate brokers already and creating a higher duty of care for brokers.

the Act proposes applicability to persons operating outside of the physical boundaries of the state, who use the mail, telephone, or electronic means to do business in New Mexico and that this provision may have constitutional problems under the Interstate Commerce Clause.

FISCAL IMPLICATIONS

There is no appropriation contained in this bill.

RLD anticipates increased costs to the agency. The department predicts that enactment of the bill would cause FID to require: an additional 3 FTEs (an industry manager, an examiner, and a

clerk specialist), computers, office space, filing cabinets, per-diem and vehicle costs.

The department estimates the costs of the predicted needs as follows:

1 Industry Manager @ 48,000 + 30%	\$ 62,400
1 Examiner @ \$30,000 + 30% benefits	\$ 39,000
1 Clerk @ \$20,000 + 30% benefits	\$ 26,000
3 computers @ 3000 ea.	\$ 9,000
Office space 3 additional employees @ 150 sf per employee @ \$20 per sf	\$ 9,000
3 filing cabinet expansions @ \$3,000 each	\$ 9,000
Per Diem @ \$211 per week times 13 weeks times 1 examiner	\$ 2,743
1 car	<u>\$ 5,000</u>
Total	\$162,143

ADMINISTRATIVE IMPLICATIONS

According to RLD, FID would be faced with the following simultaneous challenges between May 1, 2005 and July 1, 2005 should this bill be enacted:

- creating new mortgage lender and broker applications forms and licenses,
- testing existing licensing software
- enhancing existing licensing software
- creating an education curriculum
- tracking continuing education requirements
- determining credit hour formulas
- accrediting of education sponsors and programs
- creating an examination consistent with application requirements
- reviewing all new applications forms
- creating background checks (criminal and credit records)
- establishing reporting requirements
- tracking supervision of places of business of each licensee via the principal loan officer, managing loan officer, principal broker and managing broker designations,
- determining and setting licensing and surety bond fees and
- verifying exemptions for all mortgage lenders and brokers

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The bill relates to The Home Loan Protection Act and The Unfair Practices Act, the federal truth in lending act, the Real Estate Settlement Procedures Act and the Uniform Standards of Professional Appraisal Practice.

TECHNICAL ISSUES

RLD cites:

Page 5, lines 8 through 10 as including language that is unclear: "independent contractor" means a person who contracts with a mortgage lender, mortgage broker or an exempt person to perform a service and is not directed or controlled by the other person and is not required to maintain separate records regarding the contract for services with respect to accounting, taxes and other matters;...

Page 10, line 6 the meaning of the term "purchase money obligations" as ambiguous regarding determination as to inclusion or exclusion from the Act.

Page 10, line 24, as unclear as to why an employee of the real estate commission qualifies for an exemption from the provisions of the Act.

Page 14, line 5, - the word "preceding" as potentially being incorrectly used.

Page 14, line 13, - as unclear as to what is meant by the term "residential mortgage lending of the applicant's education"

Page 23, lines 3 through 8, - as appearing to conflict with the limits set earlier in the section. "a licensee that is a company and that employs one or more licensed mortgage brokers, a surety bond in the name of the company that covers the licensed mortgage brokers and that is in an amount equal to or in excess of the total of the bond amounts required by this section for each broker covered by the surety bond."

Page 23, line 21 through page 24, line 1, - as unclear: "A company employing a mortgage broker may obtain a bond in the name of the company that by its terms covers certain named persons who are licensed as mortgage brokers employed by the company and the amount of the bond shall be equal to the aggregate bond amounts pursuant to this section for each broker covered by the company bond"

Page 29, line 14 – as unclear: "an audit of that licensee's operations during the licensee's preceding fiscal year"

Page 29, lines 14 and 15 – as unclear: the licensee's "financial condition at the end of the preceding fiscal year within one hundred twenty days after the end of the licensee's fiscal year." A clarification of whether the financial condition is to be presented in either audited or un-audited form is suggested.

Page 24, lines 21 through 25 as lacking a provision for ascertaining the validity of the licensee's "net worth" in establishing qualification for the waiver of financial responsibility

Page 39, line 17, - as missing a word, and suggests: "administer and enforce the provisions of the mortgage..."

OTHER SUBSTANTIVE ISSUES

AGO suggests that:

In Section 3(E), the definition of "company" include sole proprietorships.

A reference be included in 3(M) to Form 1099. For years FID has used IRS Forms W2 and 1099 as indicia of employee vs. independent contractor status. Section 3(K) refers indirectly to the W2 form ("is subject to income tax withholding...").

The definition used for "misrepresent" be amended. It requires that a false statement be made "with reckless disregard" and "with intent to deceive." According to AGO, this is a fraud standard, and it omits negligent misrepresentation, whose consequences may be harmful to consumers as the consequences of fraud. AGO asserts that a more consumer-oriented standard for "misrepresent" is used by the Unfair Practices Act, § 57-12-2(D), which, is as follows: "a false or misleading oral or written statement or other representation, including any omission of a material fact, knowingly made by a mortgage broker or his or her employee or agent in connection with mortgage brokering services provided by the broker of his or her employee or agent to the borrower that may, tends to, or does

mislead or deceive the borrower."

Additional criteria be added to loan "processors" and brokers, AGO points out that some loan processors actually engage in brokering by doing more than simply verifying information.

The following Section 4(E) be amended: "Notwithstanding the provisions of this section, a person...who holds himself out to a borrower or to the general public as a mortgage broker or who engages in mortgage brokering shall be licensed pursuant to the [MLBLA]." Absent the insertion, a person who should be licensed based on what he or she is actually doing may not have to be licensed if he or she is identifying himself or herself as something other than a "mortgage broker."

In order to clarify the licensure requirement for ALL people who engage in brokering services, and that this practice is prohibited in the future, the following be inserted: "It is unlawful for any person to act as a mortgage broker, including any independent contractor, or to hold himself out to a borrower"

In Section 11(B)(1(a) the phrase "command the confidence of the community" be further defined

Bonds for all of the identified licensees not be less than \$500,000 because there may be multiple victims, whose claims may easily exceed the bond maximums in the proposed bill.)

More specific language be used in Section 14(E): ; e.g., "...[t]he bond shall insure against losses, claims, or damages resulting from an act or omission, including reckless or intentional acts or omissions, in violation of the [MLBLA]."

Allowing a waiver: of a surety bond in Section 14(F) would create the substantial danger that borrowers would have no recourse against companies who file any action in bankruptcy court or whose assets are looted by management.

The enumerated fiduciary duties outlined in Section 21 be expanded to include: (1) a duty to disclose to a borrower, orally and in a writing signed by the borrower, that the borrower is paying any yield spread premium being charged, and that the YSP represents a bonus (or kickback) to the broker for getting the borrower to agree to pay at a higher interest rate than the rate at which the lender was willing to loan to the borrower; (2) if the broker reasonably believes that the terms and conditions of a given loan are not in the best financial interest of a given borrower [e.g., a reasonable person would believe that the borrower would be unable to make the payments on a loan, and would be more likely than not to go into default and lose the home and his or her investment], a duty to disclose, orally and in a writing signed by the borrower, that the broker believes that the loan is not in his or her best financial interest, and what the potential consequences are (default and foreclosure). AGO asserts that the borrower would not be prevented from making a bad financial decision, nor the broker from profiting (by way of fees resulting from the closing of the loan), but the borrower should make the bad decision based on the experience and advise of the professional.

The following insertions in the first clause of Section 21(F): (ll. 8-9) be added: "if the

mortgage broker presents the borrower with a loan that contains a lawful prepayment penalty provision..." The AGO asserts that changing law on the validity of prepayment penalties, including the possibility that Congress may enact preempting legislation, seems to warrant the suggested additions.

Section 22(A and B) be reviewed in light of the recommended changes to Section 3(R) (definition of "misrepresent"). AGO asserts that it should always be clear that a failure to disclose a material fact (which is not necessarily the same as a concealment), will constitute "misrepresentation."

Section 22(K) be revised with the following changes: "hold himself out to the general public as a mortgage loan lender or as a mortgage loan broker, or engage in mortgage brokering, without possessing a valid license...."

Section 22(M): be amended to: "knowingly or ~~and~~ intentionally engage in the unfair practice"

Section 22(Q) include material expressly prohibiting the practice of unlicensed independent contractors brokering loans purportedly under the authority of a licensed broker be.

Section 27(A)(2 and 3) be amended to remove potential redundancy. AGO points out that under the Unfair Practices Act (57-12-10), the court MAY award treble if the judge finds that the business violated the Act "willfully," AGO asserts this is essentially the same standard as "recklessly."

The use of the conjunctive "and," in Section 27(D) rather than the disjunctive "or," would result in the danger that the court would find that the legislature intended that all three identified statutes had to have been violated before the borrower could recover; and recommends that the language be changed to: "...a violation of the [MLBLA], or the {HLP A}, or the [UPA]...."

OTHER SUBSTANTIVE ISSUES

RLD suggests that the paragraph on Page 35, lines 8 through 13 be removed. – The department asserts that reliance on the language could cause a lender/broker be incompliant with other state the general laws governing Money, Interest and Usury. According to RLD, prepayment penalties would be unenforceable pursuant to the general laws governing Money, Interest and Usury given that the lenders and brokers would be required to license pursuant to the Act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The Mortgage Loan Company and Loan Broker Act would remain in effect.

EM/lg